Supreme Court, U.S.
FILED
APR 2 1992
OFFICE OF THE CLERK

(3)

No. 91-1423

In The

Supreme Court of the United States

October Term, 1991

RAILROAD COMMISSION OF TEXAS, *et al.*,

Petitioners,

vs.

MISSOURI PACIFIC RAILROAD, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

HUGH L. McCULLEY
CRADY, JEWETT, JOHNSTON
& McCULLEY
Of Counsel
Two Houston Center
909 Fannin, Suite 1400
Houston, Texas 77010
(713) 739-7007

ROBERT BRIAN BURNS, JR.
Counsel of Record
KARL G. JOHNSON, JR.
WILSON, GROSENHEIDER
& BURNS
Attorneys for Respondents
P.O. Box 1584
Austin, Texas 78767
(512) 478-1657

BEST AVAILABLE COPY

QUESTION PRESENTED

1. Did the Fifth Circuit err in its interpretation of the pre-emption provision (45 U.S.C. § 434) of the Federal Railroad Safety Act of 1970, 45 U.S.C. § 421 *et seq.*, in finding that 16 T.A.C. § 5.619 is pre-empted?

LIST OF PARTIES

Petitioners:

Railroad Commission of Texas

Its Members: James E. Nugent
Robert Krueger
Lena Guerrero

Respondents:

Missouri Pacific Railroad Company

Missouri Pacific Railroad Company is a subsidiary of Union Pacific Corporation. Other subsidiaries of Union Pacific Corporation are Union Pacific Railroad Company, Union Pacific Resources Company and Union Pacific Realty Company.

Southern Pacific Transportation Company

Southern Pacific Transportation Company is owned by S.P.T.C. Holding, Inc., a wholly owned subsidiary of Rio Grande Industries, Inc.

St. Louis Southwestern Railway Company is controlled by Southern Pacific Transportation Company.

The Atchison, Topeka and Santa Fe Railway Company

The Atchison, Topeka and Santa Fe Railway Company is a subsidiary of Santa Fe Industries, Inc. Santa Fe Industries, Inc. is a subsidiary of Santa Fe Southern Pacific Corporation. Publicly-traded affiliates of The Atchison, Topeka and Santa Fe Railway Company are Santa Fe Natural Resources, Inc. and Santa Fe Energy Partners, L.P.

Burlington Northern Railroad Company

Burlington Northern Railroad Company is a subsidiary of Burlington Northern, Inc.

Missouri-Kansas-Texas Railroad Company

Missouri-Kansas-Texas Railroad Company is a subsidiary of Missouri Pacific Railroad Company.

Kansas City Southern Railway Company

Kansas City Southern Railway Company is a subsidiary of Kansas City Southern Industries, Inc. Louisiana and Arkansas Railway Company is a subsidiary of Kansas City Southern Railway Company. Kansas City Southern Industries, Inc. owns a majority interest in DST Systems, Inc.

Louisiana and Arkansas Railway Company

TABLE OF CONTENTS

Page

Question Presented i

List of Parties ii

Table of Contents iii

Table of Citations iv

Statement of the Case 1

Summary of Argument 3

Argument:

I. Did the Fifth Circuit err in its interpretation of the pre-emption provision (45 U.S.C. § 434) of the Federal Railroad Safety Act of 1970, 45 U.S.C. § 421 *et seq.*, in finding that 16 T.A.C. § 5.619 is pre-empted? 4

Conclusion 16

TABLE OF CITATIONS

Cases Cited:

Atchison, Topeka and Santa Fe Railway Co. v. Illinois Commerce Comm'n, 453 F. Supp. 920 (N.D. Ill. 1977) 8, 9

Donelon v. New Orleans Terminal Co., 474 F.2d 1108 (5th Cir.), cert. denied, 414 U.S. 855 (1973) 9

Contents

Page

Florida Lime and Avocado Growers v. Paul, 373 U.S. 132 (1963) 13, 15

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) 15

Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707 (1985) 5

Jones v. Rath Packing Co., 430 U.S. 519 (1977) 5, 11

Lockheed Air Terminal, Inc. v. City of Burbank, 457 F.2d 667, aff'd, 411 U.S. 624 (1973) 7

Missouri Pacific Railroad Co. v. Railroad Comm'n of Texas, 653 F. Supp. 617 (W.D. Texas 1987) 2, 12

Missouri Pacific Railroad Co. v. Railroad Comm'n of Texas, 833 F.2d 570 (5th Cir. 1987) 2, 3, 10, 11, 12, 13, 15

Missouri Pacific Railroad Co. v. Railroad Comm'n of Texas, 850 F.2d 264 (5th Cir. 1988), cert. denied, 488 U.S. 1009 (1989) 10

Missouri Pacific Railroad Co. v. Railroad Comm'n of Texas, 948 F.2d 179 (5th Cir. 1991) 3, 11, 15

National Association of Regulatory Utility Comm'rs v. Coleman, 542 F.2d 13 (3d Cir. 1976) 7, 9

Norfolk & Western Ry. Co. v. Public Utilities Comm'n of Ohio, 926 F.2d 567 (6th Cir. 1991) 15

Contents

Page

Northern Border Pipeline Co. v. Jackson City, 512 F. Supp. 1261 (D. Minn. 1981) 14, 15

Pacific Gas & Electric Co. v. State Energy Resources Comm'n, 461 U.S. 190 (1983) 5

Perez v. Campbell, 402 U.S. 637 (1971) 13, 14, 15

Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) 15

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 5

Schweiker v. Hansen, 450 U.S. 785 (1981) 16

Southern Pacific Transportation Co. v. Public Utilities Comm'n of the State of California, 820 F.2d 1111 (9th Cir. 1987) 4

Statutes Cited:

45 U.S.C. §§ 421-444 ..... i, 3, 4

45 U.S.C. § 434 ..... *passim*

United States Constitution Cited:

Article VI, Clause 2 5

Other Authorities Cited:

16 T.A.C. §§ 5.616-5.621 1

Contents

Page

16 T.A.C. § 5.619 ..... *passim*

49 C.F.R. Part 213 ..... 8, 10

116 Cong. Rec. 27613 (August 6, 1970) 7

1970 U.S. Cong. and Ad. News, 91st Cong. 2nd Sess. 4104 7

No. 91-1423

In The

Supreme Court of the United States

October Term, 1991

RAILROAD COMMISSION OF TEXAS, *et al.*,

Petitioners,

vs.

MISSOURI PACIFIC RAILROAD, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On December 6, 1985, the Railroad Commission of Texas published a set of proposed rules, identified as 16 T.A.C. §§ 5.616-5.621. No administrative hearing was held, but public comments were solicited and received, including submission of

voluminous material and briefing by the respondents. On June 3, 1986, the rules with some modifications were adopted by the Railroad Commission of Texas.

On July 22, 1986, respondents filed their complaint in the United States District Court, Western District of Texas, Austin Division, complaining of the adopted rules. The railroads' complaint listed seven distinct causes of action — three based upon federal pre-emption, two based upon constitutional improprieties and two based upon state law violations. The complaint was answered in due course by petitioners.

On October 1, 1986, the railroads filed a motion for partial summary judgment. The motion for partial summary judgment addressed specifically the three pre-emption causes of action and one of the causes based upon constitutional improprieties. On November 5, 1986, the Railroad Comission filed its motion for dismissal and for summary judgment.

On January 27, 1987, the District Court granted in part the railroads' motion for partial summary judgment on the ground of pre-emption by federal law and regulation. *Missouri Pacific Railroad Co. v. Railroad Comm'n of Texas,* 653 F. Supp. 617 (W.D. Texas 1987). The Railroad Commission appealed the January 27, 1987 judgment; the Fifth Circuit's decision was rendered on December 10, 1987, and published as *Missouri Pacific Railroad Co. v. Railroad Comm'n of Texas,* 833 F.2d 570 (5th Cir. 1987). A copy of that decision (MOPAC I) is Appendix E to petitioners' petition for writ of certiorari.

The MOPAC I decision reversed in part, affirmed in part and remanded in part. Specifically regarding 16 T.A.C. § 5.619, the only state rule still involved in this case, the Fifth Circuit reversed the trial court's decision that § 5.619 was pre-empted by federal regulation covering the same subject matter and

remanded the issue for further proceedings. More specifically, the Fifth Circuit's December 10, 1987 decision (MOPAC I) held regarding 16 T.A.C. § 5.619 that the competing affidavits filed with the opposing motions in the trial court created a material fact issue concerning the interrelationship between the state walkway requirement and federal track regulations, precluding resolution of the pre-emption question by summary judgment (833 F.2d at 575, App. E at 47a).

The case was reopened at the trial court level and proceeded to full trial on the merits. On September 6, 1990, judgment was rendered finding that 16 T.A.C. § 5.619 is pre-empted by federal regulatory occupation of the subject matter and alternatively finding that the state rule is pre-empted for failing the three part test contained in 45 U.S.C. § 434, the pre-emption provision of the Federal Railroad Safety Act, 45 U.S.C. §§ 421-444. A copy of the district court's decision is Appendix C to petitioners' petition for writ of certiorari.

The September 6, 1990 judgment of the United States District Court, Western District of Texas, Austin Division, rendered after full trial on the merits, was appealed by the Railroad Commission of Texas. The Fifth Circuit rendered its second decision (MOPAC II) in this litigation on December 6, 1991; it is this appellate decision of which petitioners seek review. The singular ruling of the Fifth Circuit in MOPAC II is that 16 T.A.C. § 5.619 is pre-empted by federal regulatory coverage of its subject matter; more specifically, the Fifth Circuit held that the subject matter of this state walkway rule is covered by Federal Railroad Administration regulations governing roadbed and track structures.

SUMMARY OF ARGUMENT

The Fifth Circuit in MOPAC II (Appendix A to petitioners' petition for writ of certiorari) utilized a different analysis of 45

U.S.C. § 434 than did the Ninth Circuit in its *per curiam* affirmation (*Southern Pacific Transportation Co. v. Public Utilities Comm'n of the State of California*, 820 F.2d 1111 (9th Cir. 1987)) of a lower court's 1986 ruling on cross motions for summary judgment (*see* App. F, G to petitioners' petition for writ of certiorari). However, the California federal district court's ruling is erroneous on its face. A proper disposition of petitioners' petition for writ of certiorari would be to grant the petition with a summary disposition by affirmation of the Fifth Circuit decision. The Fifth Circuit's pre-emption analysis appropriately balances the Federal Railroad Safety Act's goal of nationally uniform railroad safety rules and state sovereignty while preserving a federal regulatory scheme. The Ninth Circuit's curt adoption of its lower court's ruling, a ruling directly contrary to United States Supreme Court precedent and over twenty years of federal court pre-emption decisions, was ill-advised. Alternatively, the petition for writ of certiorari should be denied, in recognition of the facts that the Ninth Circuit's *per curiam* decision contains no substantive, and hence precedential, analysis of the pre-emption issue and that the Fifth Circuit's analysis is both detailed and correct. The Railroad Commission of Texas' 16 T.A.C. § 5.619 is pre-empted by federal regulatory occupation of its subject matter.

ARGUMENT

I.

Did the Fifth Circuit err in its interpretation of the pre-emption provision (45 U.S.C. § 434) of the Federal Railroad Safety Act of 1970, 45 U.S.C. § 421 *et seq.*, in finding that 16 T.A.C. § 5.619 is pre-empted?

Petitioners assert that the Fifth Circuit decision errs in its application of Federal Railroad Safety Act pre-emption by improperly emphasizing national uniformity of regulations, and

champion a Ninth Circuit approach which utilizes a litmus test of comparison of purported objectives. Not only did the Fifth Circuit carefully balance the state and federal roles and properly consider both in its decision, but the Ninth Circuit approach, by clear federal precedent, is erroneous.

The Supremacy Clause, U.S. Const., art. VI, Cl. 2, nullifies state laws that interfere with or are contrary to federal law. Congress is authorized to absolutely pre-empt state rulemaking authority in a particular area. *Pacific Gas & Electric Co. v. State Energy Resources Comm'n*, 461 U.S. 190 (1983); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). Even where Congress has not entirely displaced state rulemaking in a specific area, those lower laws are pre-empted to the extent that they conflict with federal law by standing as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Congressional intent to pre-empt state law in a given area may be inferred from the existence of a comprehensive scheme of federal regulation and when the area of law is one in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state law on the same subject. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

In the area of rail safety matters, Congress has *expressly* declared its intent regarding pre-emption of state and local rules. 45 U.S.C. § 434 specifically provides that when federal law and regulation occupy a rail safety matter, no state law or regulation is permissible. When federal law and regulation address a rail safety matter but fail to wholly occupy the area, state regulation is only permitted if it satisfies three specific criteria. The pre-emption provision reads:

> The Congress declares that laws, rules, regulations,

> orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. § 434.

Congressional intent to pre-empt most state regulation except under narrow circumstances is made clear in the congressional deliberations prior to enactment of the Federal Railroad Safety Act. The House Report accompanying the draft bill clearly articulates the intent to establish uniform national standards:

> With the exception of industrial or plant railroads, the railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulation and enforcement. It is a national system . . . . The integral operating parts of these companies cross many State lines. In addition to the obvious areas of rolling stock and employees, such elements as operating rules, signal systems, power supply systems, and communication systems of a single company

> normally cross numerous State lines. To subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

1970 U.S. Cong. and Ad. News, 91st Cong. 2nd Sess. 4104, 4110-11.

In the House of Representatives discussion before the House vote on the Federal Railroad Safety Act, Rep. Jake Pickle explained Congress' intent to narrowly limit state action:

> Perhaps the most beneficial aspect of this legislation is that, unlike the Senate version, this bill precludes the possibility of 50 different sets of safety regulations from 50 different States. We take away the potential for patchwork and jig-saw puzzles in the area of railroad safety.

116 Cong. Rec. 27613 (August 6, 1970).

The text of the bill itself, together with these legislative history excerpts, evince a congressional intent that the Federal Railroad Safety Act and regulations promulgated thereunder are intended to supersede the exercise of state authority except in narrow circumstances. When Congress has manifested its intent clearly, there is no presumption against pre-emption of state safety regulations. *See, e.g., National Association of Regulatory Utility Comm'rs v. Colemen,* 542 F.2d 13 (3d Cir. 1976); *Lockheed Air Terminal, Inc. v. City of Burbank,* 457 F.2d 667 (9th Cir. 1972), *aff'd,* 411 U.S. 624 (1973).

After enactment of the bill the Federal Railroad Administration, the duly authorized representative of the Secretary

of Transportation, adopted sweeping regulations that include specifications for the roadbed, track geometry and track structure. 49 C.F.R. Part 213 (1985). These federal regulations comprehensively address rail safety standards, including specifications for the roadbed, track geometry and track structure. The scope provision of subpart B of 49 C.F.R. Part 213, that subpart specifically addressing the roadbed, describes its domain as the "roadbed and areas immediately adjacent to the roadbed."

When courts have been faced with the task of discerning the congressional intent of 45 U.S.C. § 434 *vis-a-vis* pre-emption, most have read it to provide a narrow exception to federal pre-emption of state regulation. In *Atchison, Topeka and Santa Fe Railway Co. v. Illinois Commerce Comm'n,* 453 F. Supp. 920 (N.D. Ill. 1977), the court considered a state order which required special handling of 130 commodities in addition to those commodities federal regulations already required to be specially handled. In addressing the pre-emption standard of 45 U.S.C. § 434, the court held that the standard ought to be read to broadly pre-empt state regulation:

> Although the court has found no reported decision which addresses the precise problems raised by this case, those which have dealt with the Railroad Safety Act are uniform in their finding of Congressional intent to pre-empt most state regulation relating to railroad safety. Commenting on § 434, which is quoted above, the Third Circuit said, "We believe these statutory provisions evince, as the district court determined, 'a total pre-emptive intent.' " Similarly, the Fifth Circuit has noted, "The meaning of the Congressional declaration is clear. The ultimate goal of the Act is to establish nationally uniform control of railroad safety . . ."

ATS&F v. ICC at 925 (quoting *National Association of Regulatory Utility Comm'rs v. Coleman*, 542 F.2d 11, 13 (3d Cir. 1976) and *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir.), *cert. denied*, 414 U.S. 855 (1973)).

The Fifth Circuit, in a case in which this Court denied a petition for certiorari, had already assessed congressional intent regarding pre-emption of state regulations of rail safety matters. In *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108 (5th Cir.), *cert. denied*, 414 U.S. 855 (1973), the Fifth Circuit considered a Louisiana parish's attempt to regulate allegedly dangerous conditions of railroad tracks, roadbeds and other facilities. The Fifth Circuit held:

> The meaning of the Congressional declaration is clear. The ultimate goal of the Act is to establish nationally uniform control of railroad safety, but the statute is not ironclad. The Act specifically authorizes a narrow spectrum of deviation from national uniformity, and the issue here is whether appellants' state court suit falls within one of the permissible exceptions.

Id. at 1112.

Indeed, a recent Fifth Circuit case between these same parties involved the railroads' challenge to a different state regulation (a caboose rule). The appellate court was charged with determining the pre-emptive effect of the Federal Railroad Safety Act on that state rule. While the Fifth Circuit with the caboose rule found implied pre-emption, an issue not raised herein, the appellate court did note the *de minimus* role of state regulations:

> We read the statement as indicative of congressional intent that states play an important

> stopgap role in the safe transition from state to federal regulation of railroads. The FRSA has been in effect eighteen years. If there remain non-local matters of railroad safety open for state regulation, they do not include areas in which the FRA has chosen not to act.

Missouri Pacific Railroad, et al. v. Railroad Comm'n of Texas, et al., 850 F.2d 264, 268 (5th Cir. 1988), *cert. denied*, 488 U.S. 1009 (1989).

For the purposes of general pre-emption analysis, it is clear that the Fifth Circuit had already ruled that only a narrow exception exists to federal pre-emption in rail safety matters. In short, 45 U.S.C. § 434 generally only allows a narrow exception to federal control of railroad safety matters, pre-empting most state regulation.

Against this backdrop of the Federal Railroad Safety Act's legislative history and judicial treatment, the Fifth Circuit considered the state rule which requires construction of walkways on the track roadbed, that zone of soil or rock which supports loads from the track structure and for which zone the Federal Railroad Administration has prescribed minimum specifications. The Fifth Circuit drew from its earlier walkway decision, MOPAC I (Appendix E to petitioners' petition for writ of certiorari), to discern the meaning of the phase "covering the subject matter" in the statute; the court concluded that a pragmatic approach to reconciliation of the federal regulations concerning roadbed and track structure (49 C.F.R. Part 213) and the state rule is appropriate. Specifically, the Fifth Circuit stated in its first decision and referenced in its second:

> This would be the case if, from a practical standpoint, the width, surface and slope

> requirements of the state walkway regulation generally add to the FRA standards by requiring the railroad to strengthen or enlarge the roadbed beyond FRA requirements. If the walkway regulation has this effect, we hold that the federal regulation has "covered the subject matter" of track composition and design and that the state regulation conflicts with § 434's purpose to foster national rail safety standards "to the extent practicable."

833 F.2d at 575, Appendix E at 47a.

If the implementation of the state walkway rule would "add to" the Federal Railroad Administration's track structure regulations, the Fifth Circuit stated that 16 T.A.C. § 5.619 would be pre-empted.[1] The task of the trial court on remand was to review all factual evidencce concerning the practical effects of the state walkway regulation on the Federal Railroad Administration standards to see if the former did "add to" Federal Railroad Administration standards. The trial court found that the state rule did add to federal standards and was hence pre-empted, and the Fifth Circuit affirmed this in MOPAC II.[2]

---

1. This type of pragmatic approach to the pre-emption question of whether a state rule stands as an obstacle to a federal proscription is precisely what this Court has deemed appropriate. Justice Marshall wrote: "Our task is 'to determine whether, under the circumstances of this particular case, (the State's) law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' [Citations omitted.] This inquiry requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1976).

2. Incidentally, the trial court's conclusion that the state walkway rule is pre-empted was supported by the Federal Railroad Administration. By letter

(Cont'd)

While applying its pragmatic approach to the pre-emption analysis, the Fifth Circuit was careful to recognize and consider the state's role in railroad safety regulation. The appellate court recognized that some state regulations of walkways might be consistent with Federal Railroad Administration track structure and construction requirements, and indeed provided petitioners an example of just such a permitted state walkway regulation. (833 F.2d at 575, App. E at 47a, nt. 12). In short, the Fifth Circuit recognized the state's permitted role in railroad safety matters and carefully balanced that role with the pervasive federal regulatory scheme embracing roadbed and track structures.

In contrast to the Fifth Circuit's reasoned approach, the petitioners promote the Ninth Circuit's *per curiam* litmus test of comparing the stated objectives of potentially conflicting federal and state regulations. Petitioners assert that whether federal and state regulations "cover the same subject matter" depends upon whether they have the same purpose, and rely upon the California federal lower court's unadorned conclusion that: "State and federal regulations therefore cannot be held to cover the same subject matter unless they address the same safety concerns." (647 F. Supp. at 1225, App. F at 63a).

(Cont'd)
from Chief Counsel John M. Mason of the U.S. Department of Transportation, Federal Railroad Administration, addressed to the individual Railroad Commission members and provided to the trial court, the Federal Railroad Administration stated after a detailed discussion:

> In conclusion, it is my opinion as Chief Counsel that § 5.619 has been pre-empted, since the subject matter has been addressed by the Federal Railroad Administration and the broad nature of the order does not comport with the Safety Act criteria for additional State requirements.

Such an interpretation is far from the congressional intent to create a narrow exception to federal pre-emption of most state rail safety regulation. Such an interpretation would allow any state rail safety rule to stand regardless of how it impaired the federal regulatory scheme, so long as a state official could incant a different safety purpose. The Fifth Circuit in MOPAC I considered and rejected such an interpretation.

> If the purpose of the state regulation was alone controlling, a state could enact a walkway requirement or other safety regulation that hindered or prevented a railroad from complying simultaneously with an FRA regulation designed to enhance safety in a different area. Federal superintendence of the field would be thwarted by such a mincing construction of whether FRA regulations "cover the subject matter."

(833 F.2d at 574, App. E at 45a).

Case law confirms that the underlying purpose of a state rule is not controlling in a pre-emption analysis. This Court has stated:

> The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.

Florida Lime and Avocado Growers v. Paul, 373 U.S. 132, 142 (1963).

Similarly in *Perez v. Campbell,* 402 U.S. 637 (1971), this Court stated:

> We can no longer adhere to the aberrational doctrine of *Kesler* and *Reitz* that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. Apart from the fact that it is at odds with the approach taken in nearly all our Supremacy Clause cases, such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy — other than frustration of the federal objective — that would be tangentially furthered by the proposed state law.

Id. at 651-52.

In *Northern Border Pipeline Co. v. Jackson City,* 512 F. Supp. 1261 (D. Minn. 1981), the court ruled that the Federal Natural Gas Pipeline Safety Act pre-empted a local ordinance requiring pipelines to be buried deeper than required by federal law. The federal statute was aimed at insuring safe interstate transmission of gas, whereas the local ordinance was aimed at protecting the environment.

> The Gas Safety Act and its legislative history indicate that Congress has unmistakably ordained that the federal law pre-empts state law. The case law is in agreement . . . The fact that the ordinance here is cast in terms of natural resources protection is not determinative. Whether or not federal legislation pre-empts state and local regulation rests on the effect rather than the state purposes of the legislation.

Id. at 1265.

Differing objectives of federal and state proscription are not determinative in a pre-emption analysis.[3] Petitioners' assertion that the Ninth Circuit's *per curiam* adoption of such an approach is proper belies federal precedent and reason.

Petitioners make mention of the *Norfolk & Western Ry. Co. v. Public Utilities Comm'n of Ohio*, 926 F.2d 567 (6th Cir. 1991) decision as in some fashion affecting the different analyses of 45 U.S.C. § 434 by the Fifth and Ninth Circuits. A simple review of the *Norfolk* case reveals that the pre-emption issue involved was one of implied pre-emption per *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). The issue was whether a state may require walkways on railroad bridges in view of the Federal Railroad Administration's 1977 explicit refusal to adopt a bridge walkway regulation. As made clear early in the first Fifth Circuit decision in this case (833 F.2d at 575-576, App. E at 48a-49a), the Fifth Circuit dismissed discussion of implied pre-emption with the instant (non-bridge) walkway rule. No issue of implied pre-emption was involved in MOPAC II, the case of which petitioners seek review. The *Norfolk* case is irrelevant to this Court's deliberations.

---

3. Both *Florida Lime* and *Perez* have been frequently cited for this proposition. As a recent example, Justice White while dissenting on other matters wrote concerning pre-emption:

> Initially, the proper focus under the Supremacy Clause is not the avowed purpose for which the State adopts a given provision but the actual effect of the provision on the operation of a federal instrumentality and on its ability to achieve the objectives of federal law and policy for which it has been created.

Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 188 (1988).

CONCLUSION

While there are two different approaches to pre-emption analysis of state walkway rules, the Ninth Circuit's is clearly wrong. The petition for writ of certiorari is appropriate for summary disposition[4]; no amount of briefing or argument by petitioners can overcome federal precedent holding that the purported objective of a state rule is not controlling in a pre-emption analysis. Alternatively, since the Ninth Circuit's decision is merely a cursory *per curiam* approval without analysis or discussion, as contrasted with the detailed reasoning of the Fifth Circuit, the petition for writ of certiorari ought be denied. The Fifth Circuit recognized the state's role in railroad safety regulation, and reasonably balanced the state walkway rule against its effect on the federal regulatory structure.

---

4. Justice Marshall in dissent discussed the role of summary disposition/reversal in *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981). "A summary reversal is a rare disposition, usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." A summary affirmation appears even more rare, but here the law is settled that (1) pre-emption analysis is not determined by differing objectives of regulations, (2) there is no dispute that differing objectives was the Ninth Circuit's only criterion for its decision and (3) the Fifth Circuit's pre-emption analysis is reasoned and correct.

Respectfully submitted,

ROBERT BRIAN BURNS, JR.
Counsel of Record
KARL G. JOHNSON, JR.
WILSON, GROSENHEIDER & BURNS
Attorneys for Respondents
P.O. Box 1584
Austin, Texas 78767
(512) 478-1657

HUGH L. McCULLEY
CRADY, JEWETT, JOHNSTON & McCULLEY
Of Counsel
Two Houston Center
909 Fannin, Suite 1400
Houston, Texas 77010
(713) 739-7007